No. 219. October Term, 1899.

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Brief of Waters for P. C.

IN THE

Supreme Court of the United States.

Filed Dec. 27, 1899.

George H. Earle, Jr., Receiver of the Chestnut Street National Bank, of Philadelphia, Pennsylvania, Plaintiff in Error,

vs.

William Conway, Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

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I. A STATEMENT OF THE CASE.

The Chestnut Street National Bank of Philadelphia, Pa., failed on December 23d, 1897, and the Comptroller of the Currency of the United States, satisfied of its insolvency, appointed George H. Earle, Jr., Receiver, on January 29th, 1898, who immediately qualified and took possession of all its assets and ever since has been in possession thereof, and is administering the duties of his trust, under direction of said Comptroller. Section 5234, United States Revised Statutes. (Transcript, pages 16 and 17.) Afterwards on May 24th, 1898, attachment proceedings were instituted in mesne process against the bank in the Court of Common Pleas, No. 4, of Philadelphia County (No. 626, December Term, 1897), a court of the State of Pennsylvania.

William Conway, defendant in error in this court, is plaintiff in said State court, and sued one John G. Schall in an action in *assumpsit*, summons issuing on January 7th, 1898. (Transcript, page 12.) On February 24th, 1898, judgment was entered against John G. Schall for $1012.43. (Transcript, page 13.) On May 24th, 1898, plaintiff in State court (defendant in error) filed the following *præcipe*, viz.:—

" COMMON PLEAS, No. 4.

" *William Conway*
vs.
John G. Schall.

Dec. Term, 1897.
No. 626.

" Issue attachment execution in above case and summon
" the Chestnut Street National Bank and George H.
" Earle, Jr., Receiver of the said The Chestnut Street
" National Bank, garnishees.
" Returnable to the first Monday of June, 1898.
" Real debt, $1012.43.
" Int. from Feb. 24th, 1898.

" J. C. STILLWELL,
" *Att'y for Pl'ff.*

" MAY 24, 1898.
" To the proth'y C. P., Phila."
(Transcript, page 13.)

Attachment *sur* judgment (or attachment execution) issued from said Court of Common Pleas, returnable to it on the first Monday of June 1898, summoning by name the Chestnut Street National Bank and George H. Earle, Jr., Receiver of the said Chestnut Street National Bank, garnishees. The said writ of attachment *sur* judgment and the return thereof, as served, made by the Sheriff upon the plaintiff in error is set forth in the Transcript on pages 14 and 15. The plaintiff in error was served with the attachment on May 24th, 1898, at 1.20 P. M. On June 9th, 1898, plaintiff in error

filed a qualified entry of appearance in said case "for the "purpose only of moving said court to set aside the writ "of summons in atachment *sur* judgment," and "to dis- "miss and vacate all proceedings" in attachment against him or the bank. (Transcript, page 15.) On the same day a motion was filed by the plaintiff in error, granted as "a rule, to show cause," by the court returnable June 13th, 1898, "to set aside the service of writ of attachment *sur* judg- "ment and to dismiss and vacate all proceedings in attach- "ment herein against him or the said bank for the reason that "the said court has not jurisdiction in such an action under "Section 5242 of the Revised Statutes of the United States" (Transcript, page 16), and in support of the motion and his entry of appearance qualified as aforesaid, plaintiff in error filed on June 17th, 1898, an affidavit setting forth the facts that the Chestnut Street National Bank of Philadelphia, Pa., garnishee in the above action, was duly incorporated and organized under the laws of the United States and was declared insolvent by the Comptroller of the Currency of the United States on December 23d, 1897, and that on January 29th, 1898, the affiant was duly appointed by the Comptroller under the laws of the United States, Receiver for said insolvent bank, and as such Receiver, under the direction of said Comptroller, had taken and then held possession of all the assets of the bank, and was administering upon the duties of such trust. (Transcript, pages 16, 17.)

On June 20th, 1898, the rule granted by the court to show cause why the writ of attachment and all the proceedings thereunder should not be dismissed and vacated, came on to be heard, and upon argument the rule was discharged. (Transcript page 9.) Thereupon, the Receiver of said bank (plaintiff in error), on June 24th, 1898, by direction of the Comptroller of the Currency, appealed from the judgment of said Court of Common Pleas, No. 4, of Philadelphia County, to the Supreme Court of the State of Pennsylvania, sitting in and for the Eastern District at Philadelphia, and the cause was certified upon appeal to said Supreme Court on June 24th, 1898, and rule entered upon the appellee, William Conway,

to appear and plead on the return day of the writ in said Supreme Court, to wit, the first Monday in January, 1899, (Transcript, pages 17 and 18), assignments of error were filed in said Supreme Court of Pennsylvania alleging want of jurisdiction of said Common Pleas Court in proceedings in attachment, for the reason aforesaid. (Transcript, pages 18 and 19.) The case came on to be heard in the said Supreme Court of Pennsylvania, and on January 30th, 1899, the judgment of said Common Pleas Court discharging the rule, as aforesaid, on June 20th, 1898, was affirmed and so entered upon the records of the court, and there was filed on the same day an opinion in the case, as follows:

"SUPREME COURT OF PENNSYLVANIA.

"*William Conway* vs. "*Chestnut Street National Bank* "et al., *Appellants.*	January Term, 1898. No. 247.

"Filed January 30th, 1899.

"*Per curiam:*

"We find no error in this record of which the appel-
"lants have any just reason to complain.

"Judgment affirmed.

The case is reported in 189 Pa. St., page 610.

From this final judgment of the Supreme Court of Pennsylvania, the highest court of record of said State, the case comes into this court upon writ of error caused to be issued by the Receiver of said bank (plaintiff in error), by direction of the Comptroller of the Currency of the United States. (Transcript, pages 1 to 8, inclusive, 19, 20, and 21.)

The only questions raised in the case are as to the jurisdiction of the Court of Common Pleas, of Philadelphia County, a court of the State of Pennsylvania, to issue attachment in mesne process against an insolvent national bank, organized and incorporated under the National Bank Act and laws of the United States, a Receiver thereof having been duly appointed by the Comptroller of the Currency, who has qualified and taken possession of all assets of said insolvent bank, and is administering upon them under the laws of the United States, as an officer of the United States, particularly relying upon the portion of section 5242, United States Revised Statutes, which says:—

> "No attachment, injunction, or execution shall be is-
> "sued against such association, or its property, be-
> "fore final judgment in any suit, action, or proceeding
> "in any State, county, or municipal court."

Questions Involved and the Manner in which they are Raised.

1. The State court had jurisdiction of Schall, acquired by service of its writ of summons in *assumpsit*. The judgment against Schall is valid, and upon it the State court had jurisdiction of any other garnishee than a National bank by issuance and service (as in the case at bar) of a writ of *attachment* sur *judgment* returnable to it, but the issuing and serving of such a writ against a National banking association (as was done here) or its property is powerless, utterly null and void, and confers no jurisdiction because Congress—the supreme law-making power of the land as to National banks—has deemed it prudent to exempt them and their property from all mesne process by *attachment, injunction, or execution*, and has forbidden "any State, county or municipal court" from issuing such mesne process "in any suit, action, or proceeding." (*a.*) It is immaterial whether the legislation of Congress upon this subject be regarded as wise or otherwise, its power to so legislate is unquestioned, and this court has already construed this United States Statute (section 5242) now under consider-

ation, as we understand it, in favor of our contention in *Pacific National Bank* vs. *Mixter*, 124 U. S., 721.

(*b.*) The case at bar differs from the case No. 218 on the docket of this court, in which the Receiver of the same bank is plaintiff in error, in its facts, in that the attachment *sur* judgment was not issued and served until after the appointment of the Receiver, whereas in the other case the attachment proceedings were pending against the bank when the Receiver was appointed, and in this case the Receiver entered his appearance only for the purpose of moving the vacation and dismissal of the attachment proceedings; and the case comes to this court simply upon the question, whether or not the State court had jurisdiction under section 5242 of the Revised Statutes of the United States to commence a suit, action or proceeding by writ of attachment, injunction or execution in mesne process against the Receiver of an insolvent National bank.

(*c.*) The Common Pleas Court, No. 4, of Philadelphia County, in the State of Pennsylvania, had on May 21st, 1898, filed an opinion in the case now before this court, No. 218, October Term, 1899, in favor of its jurisdiction by attachment proceedings in mesne process against a National bank, and owing to that opinion of the court, attachments *sur* judgment were issued in a number of cases pending in the State courts against the Receiver, which are awaiting the decision of this court in the case at bar, as well as in the case before mentioned.

(*d.*) It is contended by the learned counsel for the defendant in error that while section 5242 aforesaid prohibited an attachment, injunction, or execution against a National bank before final judgment, the attachment referred to in that section is not such an attachment proceedings as we have here, where, it is claimed, the attachment is not against the bank, but againt the defendant Schall; that the property seized is not the property of the bank, but the property of Schall. In both of these propositions, we think, the learned counsel is wrong, and that the learned court in sustaining these propositions is in error. The proceeding by attachment execution, as in this

case, is the commencement of a new suit by the defendant, against whom judgment has been taken, at the instance of and for the use of the judgment creditor (defendant in error), against the plaintiff in error by a writ requiring him to appear in court and answer, and at the same time seizing by notice all the credits, effects, and property in his hands claimed to belong to the said defendant (the judgment debtor.) If the action had been one in *assumpsit* by the judgment debtor against the Receiver, the court would have had jurisdiction, but when the action is begun by issuing a writ of attachment (a seizure) garnishing the Receiver of an insolvent National bank, tying up the assets of the bank before a final judgment against it, the court, under section 5242, we claim could acquire no jurisdiction whatever, by such proceedings.

II. A SPECIFICATION OF ERRORS RELIED UPON.

1. It was error of the Pennsylvania Supreme Court to affirm the judgment of the lower court against the plaintiff in error, entered on June 20th, 1898, discharging the rule upon behalf of the bank, filed by plaintiff in error, "to vacate and "dismiss the attachment" (the bank then being in the hands of a Receiver appointed by the Comptroller of the Currency), for the reason that said State courts had not jurisdiction of the remedy by writ of attachment, injunction, or execution against the bank or against any National banking association, or its property in mesne process under section 5242 of the United States Revised Statutes.

2. It was error of the Pennsylvania Supreme Court not to have reversed the judgment of the lower court, and not to have ordered it to vacate and dismiss all attachment proceedings, and to set aside all findings and judgments based thereon against plaintiff in error or the bank, because utterly null and void for want of jurisdiction in said courts, under the laws of the United States, more particularly section 5242 of the Revised Statutes.

3. It was error of the Pennsylvania Supreme Court not to have reversed the judgment of the lower court, and not to have ordered the attachment proceedings vacated and dismissed, for the reason that the issuance and service, returnable to said lower court of a writ of attachment *sur* judgment (or attachment execution), under the statutory laws of that State, against the Receiver of an insolvent National banking association or its property before final judgment against it, is in conflict with that portion of section 5242, United States Revised Statutes, which says, "No attachment, injunction, or "execution shall be issued * * * in any suit, action, or "proceeding, in any State, county, or municipal court" against such association in *mesne* process.

4. It was error of the Pennsylvania Supreme Court not to have reversed the judgment entered by the lower court, on June 20th, 1898, discharging the rule of plaintiff in error moving to vacate and dismiss all proceedings in attachment for want of jurisdiction in the lower court, and not to have ordered the vacation and dismissal of the attachment proceedings, for the reasons that the bank, on December 23d, 1897, became insolvent, and a Receiver under section 5234 United States Revised Statutes, on January 29th, 1898, had been appointed by the Comptroller of the Currency of the United States, who—qualifying—had taken and held possession of the books, records, and assets of every description of said banking association, as such Receiver, and as an officer of the United States, under the direction of the Comptroller of the Currency before the issuance and service of the writ of attachment on May 24th, 1898, and was then, and is now, administering the duties of that trust, all of which appears of record herein. The plaintiff in error, having entered his appearance in such action for the purpose only of filing the motion or rule to vacate and dismiss the attachment for want of jurisdiction in the court for reasons therein stated. We call attention, more in detail, in this connection to the following points of error:—

(*a.*) The Receiver of an insolvent National bank is under the sole direction of the Comptroller of the Currency of the United States (section 5234, United States Revised Statutes). No power lies in any court or in any other person to direct the administration of his trust.

(*b.*) The Receiver of an insolvent National bank is required "to pay over all moneys to the Treasurer of the United "States, subject to the order of the Comptroller, and make "report to the Comptroller of all his acts and proceedings" (section 5234, United States Revised Statutes), and it would be in violation of this statute for plaintiff in error to pay over moneys upon the judgment or order of the lower court of the State of Pennsylvania in attachment in mesne process or otherwise.

(*c.*) Only after "full provision first made for refunding to "the United States any deficiency in redeeming the notes" of an insolvent National bank is the Comptroller authorized to make a ratable dividend of the money so paid over to him by the Receiver (section 5236, United States Revised Statutes), and it would violate this statute if plaintiff in error undertook to pay a dividend upon the judgment or order of the Pennsylvania State court for the collection of which, upon his refusal, an execution is ordered.

(*d.*) All claims against a Receiver of an insolvent National bank must first be either "proved to the satisfaction of the "Comptroller or adjudicated in a court of competent jurisdic-"tion." (1.) No claim has been proved to the satisfaction of the Comptroller. (2.) No claim has been adjudicated in a court of competent jurisdiction because the lower court could not acquire jurisdiction by attachment in mesne process. (Sections 5236 and 5242, United States Revised Statutes.)

(*e.*) If the power lies in the State courts of Pennsylvania to so command, by attachment in mesne process, Receivers of National banks as to prevent the application of their assets in

the manner prescribed by the National Bank Act, the power is not limited to an execution for a ratable dividend upon the sum adjudged due; it extends to a full payment, violating that portion of section 5242, United States Revised Statutes, which says:—

> "All payments of money to either (shareholders or "creditors of a National bank) made after the commission "of an act of insolvency, or in contemplation thereof, "made with a view to prevent the application of its assets "in the manner prescribed by this chapter, or with a view "to the preference of one creditor to another, except in "payment of its circulating notes, shall be utterly null "and void."

(*f.*) If Schall has title and ownership to any specific property in the hands of plaintiff in error, or of any Receiver of a National bank, if necessary, he can have recourse to a writ of replevin for its recovery, but not to a writ of attachment, injunction, or execution in mesne process.

(*g.*) The proceedings in issue in the case at bar have no element in them of an action in *replevin.*

(*h.*) Garnishing, by writ of attachment in *mesne* process in a State court, the Receiver of an insolvent national bank or its property creates a preference for one creditor of the bank over another, and is forbidden and directly prohibited by Section 5242 of the Revised Statutes of the United States.

III. A BRIEF OF THE ARGUMENT.

1. This court has jurisdiction to review upon writ of error a judgment of the highest court of a State when based upon proceedings under laws of the State that are claimed to be in conflict with the laws of the United States.

> Farmers and Mechanics' National Bank *vs.* Dearing (decided October, 1875), 91 U. S., 29.
>
> California Bank *vs.* Kennedy (decided May 24th, 1897), 167 U. S., 362.

2. The constitutionality of the National Bank Act has been judicially determined, and the supremacy of Congressional over State legislation in matters of National banks is not here disputed.

Davis *vs.* Elmira Savings Bank (decided March 2d, 1896), 161 U. S., 275.

3. In the case at bar attachment was issued, against the Receiver of a National bank as garnishee under a State law, in a State court, by a judgment creditor—in an action in which the bank became a party as garnishee only subsequent to the judgment. The bank failed December 23d, 1897, the U. S. Comptroller of the Currency appointed a Receiver on January 29th, 1898. The Receiver, who was garnished on May 24th, 1898, moved to vacate and dismiss the attachment for want of jurisdiction of the court on June 8th, 1898, and on June 20th, 1898, judgment was entered by the State court against the Receiver, discharging the rule, "to dismiss and vacate."

The Receiver, before judgment, during pendency of the attachment, had entered his appearance in the case for the purpose only of moving the dismissal of the proceedings and entered a suggestion of record as to his appointment as Receiver, and as to his taking and holding possession as such, of all the assets of the bank—thereby substituting himself as garnishee upon behalf of the bank for the purpose of moving "to vacate and dismiss the attachment"—nevertheless in face of the prohibition contained in section 5242, U. S. Rev. Stat., which reads:—

> "No attachment, injunction, or execution shall be "issued against such association or its property be- "fore final judgment in any suit, action, or proceed- "ing in any State, county, or municipal court."

the rule "to dismiss and vacate" is discharged.

4. That the portion of section 5242 just quoted prohibits "State, county, or municipal courts" from issuing an "attachment, injunction, or execution" in *mesne* proc-

ess "in any suit, action, or proceeding" against National banks, is conceded, as we understand it, both by the defendant in error and by the State courts of Pennsylvania.

The attachment, however, it says, must be limited to a debt due by the insolvent National bank in contradistinction from one due by a judgment debtor, and to a direct suit aganist the Receiver, such, for instance, as a "foreign attachment" as defined in the laws of Pennsylvania. It is contended by the defendant in error, moreover, that the particular attachment in the case at bar is not an attachment within the meaning of the prohibition, but is entirely without it. That it really is not an attachment against the bank at all, but simply an attachment against the judgment debtor, and so states on the face of the writ, and that the proceeding, so far as the bank is concerned, is only a warning served upon it, and the bringing it into court, to there inquire and determine whether or not it has in its possession property of the judgment debtor, subject to levy and execution; that while the laws of Pennsylvania name the writ "attachment execution," and upon its face it is called "attachment *sur* judgment," it is nothing more or less than "garnishment," and that "garnishment" is not within the meaning of the prohibition.

In our endeavor to reach a true construction of the portion of section 5242 under immediate discussion in its bearing upon the case at bar, we present our views somewhat in detail under the following headings:—

(*a.*) The construction of section 5242, as given by the courts.

(*b.*) The sections of the Revised Statutes of United States particularly relied upon and the attachment laws of Pennsylvania providing for "attachment execution."

(*c.*) What is garnishment?

In Pacific National Bank *vs.* Mixter (decided February 20th, 1888), 124 U. S., 721. A National Bank Examiner

was in charge of an embarrassed National Bank from November 20th, 1881, until March 18th, 1882, when the Comptroller permitted it to open its doors for business. On March 24th, 1882, creditors of the bank commenced suits, issuing orders of attachment with the original writs, as could be done under the laws of Massachusetts, and attaching deposits to the credit of the bank in two other banks of the same city. This action was brought in the United States Circuit Court. Before the issues were determined, the bank a second time closed its doors, and on May 22nd, 1882, the Comptroller appointed a Receiver. Before this, however, at once upon the commencement of the action, the bank secured a dissolution of the attachments, by giving bonds for which the laws of the State provided and it put up securities to secure the surety on the bonds from liability. The Receiver entered his appearance in the actions, filed answers upon behalf of the bank, and moved the discharge of the attachments and dismissal of the actions. His motions were all overruled and judgments entered against the bank. Thereupon he came to this court upon writs of error.

Not resting with these acts the Receiver, failing in his motions and defenses at law, filed a bill in equity in the same court against the attaching creditors, and the sureties on the bonds given to dissolve the attachments with the object of reducing to possession the securities held for protection against liability by the sureties, and to restrain the attaching creditors from enforcing the attachment bonds on the ground "that the attachments made in said actions were unauthorized, illegal, and void."

This bill in equity was dismissed by the Circuit Court (22 Fed. Rep., 694), and came upon appeal to this court.

The substantial facts in these cases are found to be the same as the facts in the case at bar, when carefully analyzed, and the principles of law governing them are equally applicable to this case.

1. The creditors attach in *mesne* process the deposits belonging to the defendant bank, the deposits happening to

be in two other banks at the time, but it matters not whether in the vaults of other banks or its own, the deposits belonged to the defendant bank.

2. In the case at bar, Schall, from a legal standpoint, is the attaching creditor to the use of the defendant in error—his judgment creditor—and sues the Receiver for an adjudication of his alleged claim, summoning the Receiver by a writ of attachment in *mesne* process garnishing the assets of the bank itself by serving a writ of attachment execution upon the Receiver.

3. The difference between Mixter's case and the one at bar is in form, but not in substance. Mixter, at the inception of the suit, having then a claim against the bank, under the laws of Massachusetts, sought (1) a personal judgment, (2) attached the assets of the bank to await a determination of the suit; whereas the defendant in error in the case at bar, at the inception of its suit aganist Schall under the laws of Pennsylvania, having no claim against the bank, which had then been declared insolvent and had closed its doors, simply sought a personal judgment against Schall and the bank was not in any way a party to the action, it had no day in court in that proceeding whatever, when personal judgment was obtained against Schall, then by the attachment-execution proceeding, and issuance and service of the attachment *sur* judgment against the Receiver, Schall, to the use of the defendant in error commences for the first time an action against the bank, for an adjudication of his claim, but commences it by an attachment in *mesne* process, garnishment, seizure by notice to the Receiver, restraining payment of the alleged indebtedness of the bank to Schall, pending the proceedings. This *mesne* process is forbidden by section 5242, and the court acquired no jurisdiction of the bank or Receiver by the issue and service of that writ. The proceeding was not only voidable, but utterly null and void, just as the attachments in *mesne* process of Mixter in the Massachusetts case were declared null

and void. In the Mixter case the original writ issued was of a twofold character, the bank was served as a defendant *in personam,* and at the same time attached *in rem,* before judgment was entered against it. The attachment in the Mixter case is vacated and dismissed by the decision of this court and the attachment proceedings are declared so utterly null and void, that the bonds given for dissolution of the attachments are declared also utterly null and void, but the adjudication of the claim by the judgment *in personam* remains, and of this the court had jurisdiction because acquired independently of the attachment, and upon this adjudicated claim the Comptroller, under section 5236, is authorized to pay dividends from the assets in the hands of the Receiver.

In the case at bar, the jurisdiction of the court in the suit of Schall to the use of the defendant in error, over the bank (plaintiff in error) is entirely dependent upon the validity of the issuance and service of the writ of attachment execution against the bank in *mesne* process. It is conceded that the jurisdiction is acquired only by this writ of attachment *sur* judgment; the court therefore had no jurisdiction and its judgment of June 20th, 1898, discharging the rule to dismiss is error.

The Mixter case was in the United States Circuit Court, but this court holds that court had no jurisdiction, for the reason, stated in its opinion on pages 726, 727 of report, viz.:—

> "The prohibition does not in express terms refer to "attachments in suits begun in the Circuit Courts of "the United States, but as by section 915 of the Re- "vised Statutes those courts are not authorized to "issue attachments in common law causes against the "property of a defendant, except as 'provided by the " 'laws of the State in which such court is held for the " 'courts thereof.' It follows that, as by the Amend- "atory Act of 1873, now part of section 5242 of the "Revised Statutes, all power of issuing attachments "against National banks before judgment, has been

"eliminated from State Statutes, there cannot be any "laws of the State providing for such a remedy on "which the Circuit Court may act. The law in this "respect stands precisely as it would if there were no "State law providing for such a remedy in any case. "It was suggested in argument that the prohibition "extended only to the use of the remedy by State "courts, and that the remedy itself still remained "to be resorted to in the courts of the United States. "But we do not so understand the law. In our "opinion the affect of the Act of Congress is to deny "the State remedy altogether, so far as suits against "National banks are concerned, and in this way oper- "ates as well on the courts of the United States as on "those of the States, although the provision was evi- "dently made to secure equality among the general "creditors in the division of the proceeds of the prop- "erty of an insolvent bank, its operation is by no "means confined to cases of actual or contemplated "insolvency. The remedy is taken away altogether "and cannot be used under any circumstances. It "was further said that if the power of issuing at- "tachments has been taken away from the State courts, "so also is the power of issuing injunctions. That "is true."

The opinion throughout is directly pertinent to the case at bar. We quote again from page 726 of report:—

"The fact that the amendment of 1873, in relation "to attachments and injunctions in State courts, was "made a part of section 5242 shows the opinion of "the revisers and of Congress that it was germane to "the other provision incorporated in that section, and "was intended as an aid to the enforcement of the "principle of equality among the creditors of an in- "solvent bank. But, however that may be, it is clear "to our minds that, as it stood originally as a part of "section 57, after 1873, and as it now stands in the

"Revised Statutes, it operates as a prohibition upon "all attachments against National banks under the "authority of the State courts. That was evidently "its purpose when first enacted, for then it was part "of a section which, while providing for suits in the "courts of the United States, or of a State, as the "plaintiff might elect, declared in express terms that "if the suit was begun in a State court no attach- "ment should issue until after judgment. The form "of its re-enactment in the Revised Statutes does not "change its meaning in this particular. It stands now, "as it did originally, as the paramount law of the "land that attachments shall not issue from State "courts against National banks, and writes into all "State attachment laws an exception in favor of Na- "tional banks. Since the Act of 1873 all the attach- "ment laws of the States must be read as if they "contained a provision in express terms that they were "not to apply to suits against a National bank."

In National Bank *vs.* Colby (decided by this court at October Term, 1874), 21 Wall., 609, it is held:—

"1. The property of a National bank organized un- "der the Act of Congress of June 3d, 1864, attached "at the suit of an individual creditor after the bank "has become insolvent, cannot be subjected to sale "for the payment of his demand, against the claim "for the property by a Receiver of the bank subse- "quently appointed."

In the case of C. Cadle, Jr., Receiver of the First National Bank of Selma, *vs.* Buford A. Tracy et al., in equity (decided by the United States Circuit Court for the Southern District of New York, April 23d, 1873), 11 Blatch., 101, *held,* Blatchford, J., rendering the opinion of the court:—

"T., a resident of Kentucky, and a creditor of a Na- "tional bank incorporated under the Act of Congress

"of June 3d, 1864 (13 U. S. Stat. at Large, 99), and "located in Alabama, brought a suit against it in the "Supreme Court of New York, to recover a debt al- "leged to be due from the bank to him, and in such "suit attached certain moneys in the possession of a "National bank in New York, as the property of the "Alabama bank. The suit was commenced by at- "tachment and publication of the summons. C., who "was appointed Receiver of the Alabama bank, under "the provisions of the said Act, was, on his own ap- "plication, substituted as defendant in such suit, in "place of the Alabama bank, with the like force and "effect as if the suit were continued in the name of "said bank, and thereupon put in an answer therein, "setting up a want of jurisdiction in the State court "over him, as an officer, or over the bank, or over "the subject of the action, and other defenses. The "suit was tried, and a judgment was rendered that "T. recover of C., as Receiver of the bank, a certain "sum, 'to be levied and collected of the moneys and " 'property whereon an attachment has been heretofore " 'levied in this action.' Afterwards, C. filed a bill in "equity in this court against T. and the New York "bank, praying for an injunction against T. from pro- "ceeding further on his attachment, or on any judg- "ment in the suit in which such attachment was is- "sued, and for the payment to him, C., of the moneys "in the hands of the New York bank. The Code of "Procedure of New York (section 227) provides "that in an action arising on contract, for the recovery "of money only, 'against a corporation created by, or " 'under the laws of, any other State, government, or " 'country,' the plaintiff, at the time of issuing the "summons, or at any time afterwards, may have the "property of such corporation attached, in the man- "ner thereinafter prescribed, as a security for the sat- "isfaction of such judgment as the plaintiff may re- "cover. The same Code (section 427) provides that "an action 'against a corporation created by, or under

"'the laws of, any other State, government, or "'country,' may be brought in the Supreme Court of "New York by a plaintiff not a resident of the State "of New York, 'when the cause of action shall have "'arisen, or the subject of the action shall be situated, "'within the State.' The bill proceeded on the "ground that the State court had no jurisdiction of "the suit against the Alabama bank, because it could "not acquire jurisdiction *in invitum* of a suit against "a corporation created under said Act, and also be- "cause the cause of action in such suit did not arise "within the State of New York, *held*:—

"(1.) That, so far as the provision of section 427 "of the Code of New York was concerned, the Su- "preme Court of New York had jurisdiction over "the suit.

"(2.) That the effect of the provisions of the fifty- "seventh section of the said Act of June 2d, 1864, "was to deprive the State court of jurisdiction over "the suit.

"(3.) That C. was not estopped by the proceed- "ings in the suit in the State court from questioning "the jurisdiction of that court over him, or its jur- "isdiction to render against him the judgment which "it did render.

"(4.) That C. was entitled to the relief prayed "for.

"A National bank incorporated under said Act can "be sued only in the courts designated in the fifty- "seventh section thereof.

"Whether the cause of action in the said suit arose "in New York *quære*.

"In the case of a corporation aggregate, no waiver "of an objection to jurisdiction can be produced, by "the fact that the corporation appears and pleads by "attorney."

In the case of Garner *vs.* Second National Bank of Providence *et al.*, decided by Judge Lacombe, of the

United States Circuit Court for the Southern District of New York, March 12th, 1895, 66 Fed. Rep., 369:—

"The plaintiff, a resident of New York, brought an "action in State court against defendant National "bank and individuals, all resident of Rhode Island. "A warrant of attachment was taken out against the "property of all three defendants, and certain moneys "of the defendant bank were attached in the hands "of the Fourth National Bank of the city of New "York. The usual order of publication was served "with the summons, January 7th and 8th, in the State "of Rhode Island. The defendant National Bank "filed its petition and bond for removal to the United "States Circuit Court, and after reviewing the ques- "tions arising upon the petition for removal, the court "sustained the application for removal, and says, on "page 379:—

" 'The case being properly removed, it only " 'remains to determine the motion to vacate " 'the attachment and service of summons. The " 'statutes of the United States expressly pro- " 'hibit the issuing of an attachment against a " 'National bank or its property before final " 'judgment in any State court. The Revised " 'Statutes United States, section 5242.

" 'Bank *vs.* Mixter, 124 U. S., 721, 8 Su- " 'preme Ct., 718.

" 'The attachment was, therefore, improperly " 'issued, and should be vacated, and inasmuch " 'as the summons was personally served out of " 'the State, such service should be set aside and " 'declared void. Motion granted.' "

In *New York* there are several decisions construing this statute. *Southwick* vs. *Bank* (decided by the Supreme Court of New York, at March Term, 1876), *7 Hun., 96*, holding that:—

"The amendment to the National Banking Act, "passed in 1873 (chapter CCLXIX., section 2), pro- "viding 'that no attachment, injunction, or execu- " 'tion shall be issued against such association or " 'its property before final judgment in any such suit, " 'action, or proceeding in any State, county, or mu- " 'nicipal court' relates only to suits, actions, or pro- "ceedings against associations located where the suit "is brought, and not to cases where the action is "against a non-resident corporation,"

was directly overruled by that court in *Rhoner* vs. *Bank*, decided at April Term, 1878, *14 Hun., 126*, saying that:—

"An attachment cannot be issued against a Na- "tional bank before final judgment, even though it "has property within this State, and is located and "carries on business in another State. (Southwick "*vs.* First National Bank of Memphis, 7 Hunn., 96. "Overruled.)"

And the same court (Supreme Court of New York), in *The Central National Bank* vs. *The Richland National Bank of Mansfield*, decided November, 1876, 52 Howard's Practice, 136, held that:—

"An attachment cannot be issued against a Na- "tional bank or its property before final judgment in "any suit, action, or proceeding in any State, county, "or municipal court. The issuing of an attachment "against these institutions or their property is strictly "prohibited by Congress, and it is only where juris- "diction cannot be acquired without resort to attach- "ment that the power of Congress to inhibit, or "rather to postpone the use until final judgment of "such provisional remedy seems to be at all ques- "tionable.

"This prohibition does not in any manner inter- "fere with the general jurisdiction of State courts

"over National banks; it does not take away the "jurisdiction over such foreign corporations having "property within this State; that jurisdiction is not "acquired by virtue of provisions of the code proced- "ure relating to this particular provisional remedy. "The jurisdiction is acquired by the service of the "summons, and that is effected by the provisions of "section 134 of the Code, or where personal service "cannot be had upon an officer, then it may be had "by publication under the provisions of section 135."

In *William H. Robinson*, respondent, *vs. The National Bank of Newberne*, appellant (decided by the Court of Appeals of New York, June 15th, 1880), *81 N. Y., 385*, the court says:—

"The provision of said Act (section 5242) prohibit- "ing the issuing of an attachment, injunction, or ex- "ecution against such an association, or its property "before final judgment applies only to an association "which has become insolvent, or to one about to "become so, as specified in the preceding part of the "section." Danforth, J., says in his opinion on page "393:—

> " 'The subject matter of the section is the
> " 'transfer of property by a banking association
> " 'made after the commission of an act of in-
> " 'solvency, or in contemplation thereof,'

"and when made under the circumstances therein "stated, such transfer, it says,

> " 'shall be utterly null and void, and no attach-
> " 'tachment * * * shall be issued against
> " 'such association or its property before final
> " 'judgment in any suit, action, or proceeding
> " 'in any State, county, or municipal court.'

"We concur with the general term in the opinion "that these words of prohibition must be deemed to "have the same relation as the other things prohib- "ited, and apply only to insolvent corporations, or

"one about to become so, and that the object of the "entire section is to prevent one creditor of the cor- "poration whose assets are insufficient to meet its lia- "bility from obtaining a preference, whether it is "sought through a voluntary assignment or transfer "of the payment, or the form of a legal proceeding "* * * the attachment is not to bring the de- "fendant into court; its object is to give the plaintiff "execution against the thing attached. (Kilburn *vs.* "Woodworth, 5 Johns., 37); it does not go beyond it; "* * * it is confined to the property taken, and "if it cannot be maintained the plaintiff is remedi- "less."

The foregoing decision of the Court of Appeals of New York was in 1880, and the following two decisions were rendered by the same court in 1882 and 1883:—

In the case of *The National Shoe and Leather Bank of the City of New York*, appellant, *vs. The Mechanics National Bank of Newark*, decided by the Court of Appeals of New York on June 20th, 1882, 89 N. Y., 440, it was held that

"An order vacating an attachment issued before "judgment is not reviewable here. A Receiver of an "insolvent National bank appointed after the issuing "of an attachment against it may, under the Code of "Civil Procedure (section 682), move to vacate the "attachment without being made a party to the "action."

And in the case of *Samuel Raynor* et al., appellants, vs. *The Pacific National Bank of Boston*, respondents, *93 N. Y. Reports, 371.*

"An attachment issued against a National bank "which is at the time insolvent is invalid (United "States Revised Statutes, section 5242), and is not "made valid by the subsequent acquisition of the "bank of further capital. The fact that the bank,

"after issuing of the attachment, pays in full does "not estop it from questioning the validity of the at- "tachment. The provision of the National Bank "Act prohibiting attachment in such cases is not re- "pealed by the Act of Congress of July 12th, 1883, "providing that the jurisdiction for suits thereafter "brought against National banks shall be the same "as for suits against State banks, and repealing laws "inconsistent therein."

The facts in the foregoing case are practically the same as in Bank vs. *Mixter,* supra.

Then comes the decision in *The Corn Exchange Bank* vs. *Blye*, which is relied upon by the learned president of the Common Pleas Court of Philadelphia County, as stated in his opinion in the case docketed in this court as No. 218, October Term (189 Pa. St., 606).

This case was decided by the Supreme Court of New York in General Term, October, 1885, *37 Hun., 473.* It came to the General Term from the Supreme Court of New York, and it is described as an "Appeal from an "order setting aside the requisition issued by the plain- "tiff to the sheriff of Orange County, directing him to "take into his possession certain bonds and certificates "claimed by the plaintiff in an action for the recovery "of their possession."

The syllabus is as follows:—

Requisition in an Action to recover Personal Property When it may Issue in an Action against the Receiver of a National Bank. United States Revised Statutes, Section 5242.

"In this action of replevin brought against the Re- "ceiver of a National bank to recover bonds and certifi- "cates claimed to belong to the plaintiff, a requisition "issued by the plaintiff to the sheriff, directing him to

"take possession thereof, was set aside upon the applica-
"tion of the defendant, upon the ground that its issue was
"prohibited by section 5242 of the United States Revised
"Statutes.

"*Held*, that the prohibition contained in that section
"against the issue of any 'attachment, injunction, or exe-
" 'cution' against such an 'association or its property be-
" 'fore final judgment in any suit, action, or proceeding
" 'in any State, county, or municipal court,' did not apply
"to such a requisition as was issued in this case; that it
"was only intended to prevent the interference with the
"assets or property owned by the bank itself, and not with
"such as might legally be claimed or proved to be the
"property of others."

In the opinion by the court, rendered by Daniels, J., Brady, J., and Davis, P. J., concurring, it is said:—

"Its (section 5242) object was to prevent the assets of
"an insolvent National bank from being appropriated or
"being interfered with by a creditor of the bank before
"the recovery of a final judgment in his action, and it has
"been so construed when it has been brought before the
"courts for consideration. (Robinson *vs.* Bank of New-
berne, N. Y., 81 N. Y., 385; Raynor *vs.* Pacific Bank,
93 *Id.*, 371; Rosenblatt *vs.* Johnston, 104 U. S., 462.)

"An action brought to recover the possession of prop-
"erty alleged not to be the property of the bank, and
"therefore not subjected to the custody or administration
"of its Receiver, is not included within the object or the
"language of this enactment. What it was designed to
"prevent was interference with the assets or property
"owned by the bank itself, and not those which might
"legally be claimed or proven to be the property of others.
"Its inhibition is that 'no attachment, injunction, or exe-
" 'cution shall be issued against such association or its
" 'property before final judgment in any suit, action, or
" 'proceeding in any State, county, or municipal court.'
"The requisition of the plaintiff was in no sense an at-
"tachment, injunction, or execution; neither was it is-

"sued against the property of the association, but for the "recovery of the possession of property claimed to belong "to the plaintiff. This section of the statute has not pro- "hibited a legal contest of this description; neither has it "subjected the party asserting a right of this nature to "any legal disability or restriction in the prosecution of "the action. And it in no event can have the effect of "depriving the Receiver of any of the assets or property "owned by the bank or secure a preference to any cred- "itor therein. All that can be accomplished by it is to "secure the recovery of the possession of the property by "the plaintiff, if it shall prove to be able to support its "claim of title made to it. If that cannot be done, or "title shown to be in the defendant as Receiver, then the "property will necessarily be returned to him. The liti- "gation must be wholly and exclusively devoted to the "investigation of the question of title, and an action for "such an investigation has in no manner been affected "by this section of the statute; it is outside of the re- "straints contained in the statute, and has in no way been "prohibited."

The case was taken to the Court of Appeals of the State of New York and decided by that court January 19th, 1886, 101 N. Y., 303. The syllabus is as follows, viz.:—

"A Receiver of an insolvent National bank acquires no "right to property in the custody of the bank, which it "does not own, as against the owner, and the provision "of the United States Revised Statutes (section 5242), "prohibiting the issuing of an attachment, injunction, or "execution against such a corporation before final judg- "ment, was not intended to protect the Receiver's custody "as against such owner.

"Accordingly, *held*, that said provision did not prohibit "the issuing, in an action against the Receiver of a Na- "tional bank to recover possession of personal property, "of a requisition directing the sheriff to take into his pos- "session the property in question; that the Receiver, if

"he desired to retain possession of the property during "the litigation, could only do so by giving the security "required, the same as other defendants in such an action."

And from the opinion of the court we quote as follows:—

"It (section 5242) specifically prohibits all transfers of "the corporate property made with a view to preferences, "and so protects the creditors from any voluntary act of "the bank which selects out favored individuals for pay- "ment. But the bank may be passive and such individ- "uals gain a preference by a suit against the corporation, "preceded or accompanied by an attachment or injunction, "or after judgment enforced by an execution. These "three things were specifically prohibited by name, each "being process well known and accurately defined in the "law, and without any general words to carry the pro- "hibition beyond them. The Receiver, by his appoint- "ment, acquires no right to property in the custody of the "bank which the latter does not own, as against the real "owner; and the section in question was plainly not in- "tended to protect the Receiver's custody as against such "owner. It aims to protect the property of the bank in "his hands and not to give him arbitrary control of what "the bank does not own. If the latter should be held, "its injustice is well suggested by the general term in its "application to special deposits of customers left merely "for safekeeping. It does not alter the case that there "is a dispute about the title, and the Receiver claims to "be owner. He might make such a claim in any case. "No law makes him the inevitable stakeholder pending "the litigation. He may become so by giving the needed "security, and we can see no reason why he should be "exempted from that obligation which falls upon others. "The plaintiff is required to give such security as the con- "dition of the writ, and the Receiver need run no risk "in the performance of his duty. It is said the word "'attachment' is used, not in the local sense affixed by "State enactments, but in a broader sense; and the defi-

"nition of Bouvier is cited. But by that definition and in "every use of the term it always assumes title in the per- "son against whom the writ issues, and seeks to hold pos- "session of his property, and on the ground and for the "reason that it is his. *No nomenclature has ever made it "the equivalent of a writ of replevin, which issues upon a "theory exactly the reverse.*

"There is no collision of jurisdictions. The authority "of the Federal courts over the assets and the right of its "officer to hold them is not questioned or invaded. No "property over which those courts have obtained jurisdic- "tion is interfered with. What is sought to be recovered "is property over which they have obtained no jurisdic- "tion, and as to which they have conferred no right upon "him."

The foregoing decisions of New York State courts were all rendered before that of this court in Pacific National Bank *vs.* Mixter, *supra.*

In Maryland the question arose directly in *The Chesapeake Bank* vs. *The First National Bank of Baltimore, Garnishee of the First National Bank of Washington* (decided by the Court of Appeals of Maryland, June 4th, 1874), *40 Maryland, 269.* Held:—

> "An attachment on warrant issued by a State court "to affect the funds of a National bank is illegal and "void, being in violation of section 57 of the Act of "Congress, chapter 106, approved June 3d, 1864, as "amended by section 2 of the Act of Congress, "chapter 26, approved June 3d, 1873, the latter sec- "tion providing 'that no attachment, injunction, or "'execution shall be issued against such (banking) "'association, or its property before final judgment "'in any suit, action, or proceeding in any State, "'county, or municipal court.' The second section "of the Act of Congress, chapter 269, approved March "3d, 1873, amending section 57 of the Act of Con- "gress, chapter 106, June 3d, 1864, is constitutional "and valid, being a provision to promote the effi-

"ciency of the National banks in performing the "functions which they were designed to serve the "Government and to protect them, not only against "interfering State legislation, but also against suits, "or proceedings in State courts by which their effi- "ciency would be impaired."

The facts of the case are stated in the opinion of the court—

"The appellant (Chesapeake Bank) on the 18th of "September, 1873, caused an attachment on warrant "to be issued out of the Superior Court of Baltimore "City to affect the property and credits of the First "National Bank of the city of Washington, D. C., "as a non-resident debtor, which was laid in the hands "of the First National Bank of Baltimore, as gar- "nishee. In October following, the garnishee filed a "motion to quash for reasons alleged and from the "judgment of the court quashing the writ, this ap- "peal is taken. It is conceded the decision of the "Superior Court was based upon the first reason stated "in the motion, as follows: "That said First National " 'Bank of Washington was, before said attachment, " 'and at the time of the issue thereof, and still is, " 'an association for the purpose of carrying on the " 'business of banking, organized duly under the Act " 'of Congress of June 3d, 1864, and that by the " 'second section of the Act of Congress, approved " 'March 3d, 1873, it is enacted that the fifty-seventh " 'section of the first mentioned Act be amended by " 'adding thereto the following: "that no attachment, " 'injunction, or execution shall be issued against such " 'association, or its property, before a final judgment " 'in any suit, action or proceeding, in any State, " 'county, or municipal court," and that by the force " 'of said section of said Acts the said attachment is " 'illegal and void.' "

The statute has been construed in other States:—

In Minnesota. In *First National Bank of Kasson* vs.

Ambrose La Due (decided by the Supreme Court of Minnesota, on November 20th, 1888), 39 Minn., 415, it is held:—

> "The Federal statutes (U. S. Rev. St., section "5242), prohibit the issuance of writs of attachment "by the State courts before final judgment against "National banking associations or their property.
>
> "An attachment and seizure of property made by "virtue of a writ so issued and served is illegal and "void and no jurisdiction over the person or property "of such an association is obtained thereby."

In Vermont. In *Safford* vs. *First National Bank of Plattsburg and Trustee* (garnishee) (decided by the Supreme Court of Vermont, at January Term, 1889), *61 Vt., 373*, the court decides:—

> "Under U. S. Rev. St., section 5242, the property "of a National bank cannot be attached before final "judgment. The trusteeing a debt due such a bank "is in effect the attachment of the property of the "bank; hence when the only service on a non-resident "bank was by leaving a copy in the hands of the "trustee, such a service is void and the court obtains "no jurisdiction. The judgment overruling motion "to dismiss is reversed and motion sustained and cause "dismissed."

In *Georgia. The Planter's Loan & Savings Bank* vs. *Berry* (the statement of facts is in the case of the National Park Bank *vs.* Berry, 89 Ga., 333 (decided by the Supreme Court of Gergia, February 13th, 1893), 91 Georgia, 264. The syllabus reads:—

> "The statute of the United States prohibits seizure "of property belonging to National banks *irrespective* "*to whether they be solvent or insolvent* before final "judgment by virtue of any attachment issued under "a State law, and returnable to a State court. *Any* "*such seizure is, therefore, void* and a bond given by a

"National bank to dissolve such attachment *served "by summons of garnishment* is also void. The giv- "ing of such bond is not an appearance in the attach- "ment case, so as to make valid a judgment entered "up on the bank in that case against the bank and the "securities executing the bond. The judgment is "wholly void and an affidavit of illegality made and "filed by one of the securities in resistance to a levy "upon his property under an execution founded on "the judgment must be sustained. The judgment be- "ing wholly void for want of jurisdiction in the court "rendering it, affidavit of illegality is a proper de- "fensive remedy."

Bleckley, Chief Justice, says:—

"How the statutes of the United States stand at "the present time on the subject of protecting Na- "tional banks against seizure of their effects by virtue "of attachments in advance of final judgments, may "be seen by reference to United States Revised Stat- "utes, section 5242. The only words necessary to "be now quoted are these: 'And no attachment, in- " 'junction, or execution shall be issued against such " 'association or its property before final judgment in " 'any suit, action, or proceeding in any State, county, " 'or municipal court.' The opinion, whether profes- "sional or judicial, which construes this legislation as "allowing seizure under attachment before final judg- "ment in case the defendant bank is solvent, and pro- "hibiting it only where the bank is insolvent, is "manifestly unsound. Certainly, no such distinction "is made in the letter, and we discern no necessity "for it in the context or in the reason and spirit of "the legislation. The statutory policy seems to be "to prevent all preference or priority in claims against "these banks sought to be acquired by seizure of ef- "fects under State authority before final adjudica- "tion of such claims, and to protect the banks from "being weakened or crippled by such antecedent

"seizures. The National banks created by Con-
"gress are to control their own assets and resources,
"as against State interference at the instance of cred-
"itors, or of pretended creditors, until the real ex-
"istence of alleged debts has been ascertained by
"final judgment. Ante-judgment seizures cannot be
"made; a State can make post-judgment seizures
"only. *Mesne* process will not suffice for seizing by
"State courts; these courts can seize alone by final
"process. This policy may be wise or unwise, whole-
"some or unwholesome, but in either event it is the
"one established by competent legislative authority,
"and must be respected and enforced accordingly.
"In Pacific National Bank *vs.* Mixter, 124 U. S., 727,
"Waite, C. J., said: Although the provision was evi-
"dently made to secure equality among the general
"creditors in the division of the proceeds of the prop-
"erty of an insolvent bank, its operation is by no
"means confined to cases of actual or contemplated
"insolvency. The remedy is taken away altogether,
"and cannot be used under any circumstances.
"Whether this was *obiter* or not, as applied to the
"facts of that case, we agree with it and accept it
"as sound interpretation of this statute."

In Massachusetts the construction of this statute came up upon the issue of a writ of injunction in the case of *Freeman Manufacturing Company* vs. *National Bank of the Republic of Boston* et al., decided January 6th, 1894, *160 Mass., 398*. The syllabus is as follows:—

"Under United States Revised Statute 5242 a
"State court has no power to issue a preliminary
"injunction against a National bank, and this pro-
"vision of the statute is not repealed by United
"States Statutes, July 12th, 1882, section 4; March
"3d, 1887, section 4; or August 13th, 1888, sec-
"tion 4."

The court says:—

"The only question before us is whether a State "court has power to issue injunctions before final "judgment.

"In Revised Statutes United States, section 5242, "after provisions avoiding payments made in con-"templation of insolvency, &c., the section continues: "'And no attachment, injunction, or execution shall "'be issued against such association or its property "'before final judgment in any suit, action, or pro-"'ceeding in any State, county, or municipal court.' "Possibly these words, if enacted in their present "connection for the first time, might be limited to "insolvent banks. Raynor *vs.* Bank, 93 N. Y., 371. "But this clause is simply a codification of a pro-"viso added to Statutes United States 1864, chapter "106, section 57 (13 Stat., 116, 117), giving juris-"diction over banks to State as well as to United "States courts, by Statute United States, 1873, "chapter 269, section 2 (17 Stat., 603). It cannot "be limited in that way. Bank *vs.* Mixter, 124 U. S., "721, 726, 727, 8 Sup. Ct., 718. There is nothing "in the context to limit it in any other. The argu-"ment that it is unreasonable that Congress should "go so far; that the presumable motive for the law "was to prevent an important wheel of business be-"ing stopped; and that this motive could be satis-"fied by limiting the injunctions mentioned to such "as would place the general assets of the bank be-"yond its control by *mesne* process having the effect "of an attachment.

"But such arguments are very doubtful ground for "giving words an unnatural construction. The "words used are of unlimited scope. The limited in-"terpretation gives them an unusual meaning. The "prohibition, whether reasonable or not, is intelligible "when we consider that, at the time when the pro-"hibition was first passed, any plaintiff was at liberty "to sue in the United States courts, and could ob-

"tain an injunction there. The fact that this power "has been taken away cannot change the construc- "tion of the words. Bank *vs.* Mixter, 124 U. S., "721, 727, 728, 8 Sup. Ct., 718. The jurisdiction "and the extent of the power to be exercised by State "courts depend upon the permission of the United "States. The wrongs likely to be done by National "banks are of a pecuniary nature, and the banks "usually are amply able to make good any damage "which they may do, so that there is not the same "necessity for preventative remedies that there is with "individuals or corporations, for whose solvency less "stringent precautions are taken. We are of opinion "that the language of the statute must be read in "its natural sense, in accordance with what we un- "derstand to have been the view of the Supreme "Court of the United States in Bank *vs.* Mixter, "*supra.*"

Sections 5234, 5236, 5242 of the U. S. Rev. Stat. are the sections particularly relied on as controlling this case.

Section 5234 provides for the appointment of the Receiver by the Comptroller of the Currency, and defines his duties as follows:—

"On becoming satisfied, as specified in sections "5226 and 5227, that any association has refused to "pay its circulating notes as therein mentioned, and "is in default, the Comptroller of the Currency may "forthwith appoint a Receiver, and require of him "such bond and security as he deems proper. Such "Receiver, under the direction of the Comptroller, "shall take possession of the books, records, and "assets of every description of such association; "collect all debts, dues, and claims belonging to it, "and upon the order of a court of record of com- "petent jurisdiction may sell or compound all bad "or doubtful debts, and on a like order may sell all "the real and personal property of such association

"on such terms as the court shall direct, and may, if "necessary to pay the debts of such association, en- "force the individual liability of the stockholders. "Such Receiver shall pay over all money so made "to the Treasurer of the United States, subject to the "order of the Comptroller, and also make report to "the Comptroller of all his acts and proceedings."

Section 5236 provides:—

"From time to time after full provision has been "first made for refunding to the United States any "deficiency in redeeming the notes of such associa- "tion. The Comptroller shall make a ratable divi- "dend of the money so paid over to him by such Re- "ceiver on all such claims as may have been proved "to his satisfaction, or adjudicated in a court of com- "petent jurisdiction, and as the proceeds of the assets "of such association are paid over to him, shall make "further dividends on all claims previously proved or "adjudicated, and the remainder of the proceeds, if "any, shall be paid over to the shareholders of such "association, or their legal representatives, in propor- "tion to the stock by them respectively held."

Section 5242 reads:—

"All transfers of the notes, bonds, bills of exchange, "or other evidences of debt owing to any National "banking association, or of deposits to its credit; all "assignments of mortgages, securities on real estate, "or of judgments or decrees in its favor; all deposits "of money, bullion, or other valuable thing for its "use, or for the use of any of its shareholders or "creditors, and all payments of money to either made "after the commission of an act of insolvency, or in "contemplation thereof, made with a view to prevent "the application of its assets in the manner prescribed "by this chapter, or with a view to the preference of "one creditor to another, except in payment of its

"circulating notes, shall be utterly null and void. "No attachment, injunction, or execution shall be is- "sued against such association, or its property, before "final judgment in any suit, action, or proceeding in "any State, county, or municipal court."

The proceedings in attachment execution under the laws of Pennsylvania are so called because the writ is founded upon a judgment, and as this is the writ under discussion, we will quote from the laws of the State providing therefor. See Pepper & Lewis' Digest, commencing vol. I., page 1939, section 55 (1836, June 16th, P. L., 755, section 35):—

"In the case of a debt due to the defendant, or of "a deposit of money made by him, or of goods or "chattels pawned, pledged, or demised as aforesaid, "the same may be attached and levied in satisfaction "of the judgment in the manner allowed in the case "of a foreign attachment, but in such case a clause "in the nature of a *scire facias* against a garnishee "in foreign attachment shall be inserted in such writ "of attachment requiring such debtor, depositary, "bailee, pawnee, or person holding by demise, as "aforesaid, to appear at the next term of the court, "or at such other time as the court from which such "process may issue shall appoint, and show cause "why such judgment shall not be levied of the effects "of the defendant in his hands."

Again, on page 1942, section 56, *Id.* (1836, June 16th, P. L., 755, section 36):—

"It shall be the duty of the officer charged with "the execution of such writ, to serve a copy thereof "upon the defendant in such judgment and upon "every person and corporation within its proper "county named in the said writ of attachment, in the "manner provided for the service of a writ of sum- "mons in a personal action."

And again, on page 1942, section 58, *Id.* (1836, June 16th, P. L., 755, section 37):—

> "From and after the service of such writ all stock "belonging to the defendant in the corporation upon "which service shall be so made, and all debts and all "deposits of money and all other effects belonging "or due to defendant by the person or corporation "upon which service shall be so made, shall remain "attached in the hands of such corporation or person "in the manner heretofore practiced and allowed in "the case of foreign attachment."

Again, on page 1943, section 59, *Id.* (1836, June 16th, P. L., 755, section 38):—

> "If judgment shall be given for the plaintiff in such "attachment, it shall be lawful for him to have execu-"tion thereof, as follows, to wit: (1) If the property "attached be stock in a corporation, as aforesaid, the "execution shall be by writ of *fieri facias* against the "original defendant by virtue of which such stock, "or so much thereof as shall be necessary to satisfy "the judgment and costs, may be sold by the sheriff, "as in other cases; (2) If the property attached be a "deposit in money or a debt due, as aforesaid, exe-"cution shall be had in the manner allowed in the case "of effects in the hands of a garnishee in a foreign "attachment."

And again, on page 1946, section 64 (1872, April 5th, P. L., 43, section 1):—

> "In all cases where execution attachments have "been, or which shall hereafter be, issued out of any "Court of Common Pleas (or district court) of this "Commonwealth attaching debts, moneys, stocks, or "other property in the hands of any persons or cor-"porations as garnishees, and when from any cause "proceedings have been stayed on the judgment on "which such execution attachments have been issued,

"it shall be lawful for the defendant, or defendants "in the judgment on which said attachments shall "have been issued, to file a bond with one or more "sureties, to be approved of by the court issuing said "attachment, in such amount as the court shall di- "rect, conditioned that the defendants shall pay to "the plaintiff, on the determination of the case, what- "ever amount shall be finally adjudged to be due by "the garnishees under the said attachments, if such "amount shall be required to pay the judgment and "costs, and on filing such bond, approved as aforesaid, "the said garnishee or garnishees shall thereupon be "discharged from all further liability under said at- "tachment, but the cause may be prosecuted to final "judgment for the purpose of ascertaining the amount "due by the garnishee, but the defendant and his sure- "ties in the bond shall alone be liable to pay such "judgments and costs."

And again, on page 1947, section 65, *Id.* (1863, April 22d, P. L., 527, section 1):—

"Where in any attachment-execution, or *scire* "*facias* on foreign attachment issued out of any court "of record in this State, the garnishee, after issue "joined therein, shall be found to have in his pos- "session or control no real or personal property of "the defendant, nor to owe him any debt other than "such property or debts as shall have been already "admitted by the plea or answers of the garnishee, "or in case without going to trial the plaintiff shall "take judgment against the garnishee for what shall "be so admitted in his plea or answer, then, and in "either such case, the garnishee shall be entitled, in "addition to the costs already allowed by law, to a "reasonable counsel fee out of the property in his or "their hands, to be determined and taxed in case of "dispute by the court, or by some person appointed "for that purpose."

The only exemption to attachment execution under this law is on page 1946, section 63, *Id.* (1845, April 15th, P. L., 459, section 5):—

> "The wages of any laborers, or the salary of any "person in public or private employment, shall not "be liable to attachment in the hands of the em- "ployer."

In Pennsylvania the laws provide for attachment proceedings as follows:—

1. A "domestic attachment" is a proceeding against an inhabitant of the State who absconds, &c., with intent to defraud creditors or avoid service of process.

Brewster's Practice (Common Pleas) (2d ed., 1896), vol. I., 108 *et seq.*

2. A "foreign attachment" is a proceeding against non-residents of the State.

Brewster's Practice (Common Pleas) (2d ed., 1896), vol. I., section 75 *et seq.*

3. An attachment, under the "Fraudulent Debtors' Act of 1869," applies to removal or assignment or concealment of property, and to fraud in contracting the debt.

Brewster's Practice (Common Pleas) (2d ed., 1896), vol. I., section 51 *et seq.*

4. An attachment execution or attachment *sur* judgment is, as its name implies, an attachment begun after judgment has been first entered against the defendant.

Brewster's Practice (Common Pleas) (2d ed., 1896), vol. II., section 3253 *et seq.*

Brewster's Practice is a recognized authority upon all subjects of practice in the State of Pennsylvania.

The "domestic," "foreign," and "fraudulent debtor" proceedings before named are generally used where an

attachment is sought at the inception of the suit, and have a twofold purpose: (1) Personal service upon the defendant against whom a judgment is desired; (2) an immediate lien on defendant's property to await and satisfy such judgment, if attached. The first is by the writ of summons in *assumpsit*, &c., and the second by seizure by writ of attachment of defendant's property, subject to direct levy and execution, or by garnishing defendant's property in the hands of his debtors that is not subject to direct levy and execution.

In each of them garnishment is an important feature of the attachment proceedings. It is not necessary for the attachment to issue at the inception of the suit; personal service may first be had, and attachment proceedings begun after personal service upon the defendant, but before judgment. In each of the first three proceedings named the claim of the plaintiff not having been determined before judgment, the defendant is protected from oppressive suits by requiring, as a prerequisite to attachment, an affidavit as to the truth and justness of the claim, and a bond of indemnity against damages in case of failure of suit. The dual proceedings being (1) *in personam* (seeking a personal judgment against defendant); (2) *in rem* (seizure or garnishment of property of defendant awaiting the issue *in personam*).

In the "attachment execution" proceeding, the fourth named, the one now under consideration, the defendant in error first pursued ~~Long~~, *in personam*, to judgment before pursuing him *in rem*. It is upon the judgment *in personam* against ~~Long~~ that the writ of attachment is issued and served against the bank as garnishee. The writ of attachment is practically the same as it would have been if issued against the bank, garnishee, under "domestic," "foreign," or "fraudulent debtor" proceedings—the bank, by a summary proceeding commenced against it, is attached in mesne process summoning it into court to appear and answer within fifteen days or judgment *sec. reg.*

No more effectively could an injunction restrain than an "attachment execution." It operates as an injunction,

also as an execution or aid in execution. It has in it all the elements expressly prohibited and intended to be prohibited by Congress in the letter and spirit of the enactment in the Revised Statutes, section 5242.

Shinn on Attachment & Garnishment, vol. I., section 191 *et seq.;* also *Id.*, vol. II., section 466 *et seq.*

In the case of Ege *vs.* Koontz (decided by the Supreme Court of Pennsylvania in 1846), 3 Pa. St., 109, it is *held*:—

> "The legal effect of an attachment laid upon a debt "is, to restrain the garnishee from paying over the "money, either to his individual creditor or to the at- "taching creditor, until the attachment is disposed "of, and then only according to the result of that "proceeding."

Ancillary, in a sense, to the action against Schall *in personam*, in which judgment has been entered and in which sense only, that is, from the standpoint of the judgment, it is sometimes called "final process;" in another sense, that of its relation to the garnishee, it is the commencement of an original "suit, action, or proceed- "ing" by the judgment debtor (Schall) to the use of the judgment creditor of Schall (defendant in error) by attachment in *mesne* process against the bank, or its Receiver. "Proceedings upon attachment execution bear a "close analogy to those in foreign attachment, subsequent "to the judgment against defendant."

Brewster's Practice (Common Pleas) (2d ed., 1896), vol. II., section 3261;

Shinn on Attachment & Garnishment (1896), vol. II., section 469 *et seq.;*

Gochenaur's Executors *vs.* Hostetter, 18 Pa. St., 414;

Childs *vs.* Digby, 24 Pa. St., 26-27;

Shinn on Attachment and Garnishment (1896), vol. II., section 469 and cases cited in note.

Garnishment is a supplemental proceeding to execution.

Freeman on Execution (2d ed.), vol. II., section 416;
Am. & Eng. Enc. of Law, vol. VIII., page 1101.

Garnishment is a mode of attachment, a seizure by notice.

Am. & Eng. Enc. of Law, vol. VIII., 1101 *et seq.;*
Rood on Garnishment (1896), section 192 (page 238);
Shinn on Attachment & Garnishment (1896), vol. II., section 467.

General nature of garnishment.

Am. and Eng. Enc. of Law, vol. VIII., page 1100;
Rood on Garnishment (1896), chapter I.;
Shinn on Attachment & Garnishment (1896), chapter XXIII.

"Garnishment is a proceeding by which the plain-
"tiff, in a suit to recover on a debt, may institute
"another suit at law, in lieu of the defendant, against
"a debtor of the defendant, without the defendant's
"concurrence, and it may be against his will to sub-
"ject the money or property in the hands of such
"debtor to the satisfaction of the plaintiff's judgment
"in the first suit."

Shinn on Attachment & Garnishment (1896), vol. II., section 465 *et seq.*

"The right of attachment by garnishment is not
"known to the common law. It depends wholly
"upon the provisions of the statute for its validity
"and effect, and it cannot be extended beyond the
"strict provisions thereof."

Shinn on Attachment & Garnishment, vol. II., section 485.

National, State, and municipal governments and public officers are exempt from garnishment. (Among other reasons, because it is against public policy.)

Rood on Garnishment (1896), sections 25, 26.

The Federal government, the State, the District of Columbia, a county or borough, a city, the town, a school district cannot be made a garnishee.

Shinn on Attachment & Garnishment (1896), vol. II., section 500, and note on page 873 and cases cited.

A treasurer or other officer of a National, State, or municipal government is beyond the reach of a process of garnishment.

Id., section 503.

In this connection we quote from the opinion in Farmer's & Mechanic's National Bank *vs.* Dearing, decided by this court at October Term, 1875, error to the Court of Appeals of the State of New York, *91 U. S., 29.* The usury laws of the State of New York were held to be in conflict with the laws of the United States, and the judgment of the Court of Appeals of that State was reversed. Mr. Justice Swayne, rendering the opinion of this court, on page 33 says:—

"The constitutionality of the Act of 1864 (National "Bank Act) is not questioned. It rests on the same "principle as the Act creating the Second Bank of "the United States. The reasoning of Secretary "Hamilton, and of this court in McCulloch *vs.* Mary-"land (4 Wheat., 316), and in Osburne *vs.* The Bank "of the United States (9 *Id.*, 708), therefore applies. "The National banks organized under the Act are "instruments designed to be used to aid the Govern-"ment in the administration of an important branch "of the public service. They are means appropriate "to that end. Of the degree of the necessity which "existed for creating them Congress is the sole judge.

"Being such means brought into existence for the "purpose, and intended to be so employed, the States "can exercise no control over them, nor in anywise "affect their operation, except in so far as Congress "may see proper to permit. Anything beyond this "is 'an abuse, because it is the usurpation of power "'which a single State cannot give' against the "National will. 'The States have no power, by tax-"'ation or otherwise, to retard, impede, burden, or "'in any manner control the operation of the consti-"'tutional laws enacted by Congress, to carry into exe-"'cution the powers vested in the general govern-"'ment.'"

Bank of the United States *vs.* McCulloch, *supra;*
Weston & others *vs.* Charleston, 2 Pet., 466;
Brown *vs.* Maryland, 12 Wheat., 419;
Dobbins *vs.* Erie County, *Id.*, 419.

"The power to create carries with it the power to "preserve. The latter is a corollary from the former.

"The principle announced in the authority cited is "indispensable to the efficiency of the independence, "and, indeed, to the beneficial existence of the gen-"eral Government, otherwise it would be liable in the "discharge of its most important trusts, to be an-"noyed and thwarted by the will or caprice of every "State in the Union. Infinite confusion would fol-"low. The Government would be reduced to a piti-"able condition of weakness. The form might re-"main, but the vital essence would have departed."

In view, therefore, of the fact that "National banks "organized under the Act are instruments designed to be "used to aid the Government in the administration of an "important branch of the public service," and were cre-ated and are controlled solely by the laws of the United States, and in a sense are agents of the United States, it is in line with the exemption of the United States "Gov-

"ernment" and its public officers from being subjected to the process of garnishment, that National banks should be so exempted, and the construction, we claim, for section 5242 is the natural one, and in accord with ruling principles and reason.

The Receiver of a National bank appointed by the Comptroller of the Currency, as provided by law, is presumed to be appointed by the approval and concurrence of the Secretary of the Treasury, within the meaning of section 2, article II., of the Constitution of the United States, and is an officer of the United States.

Price *vs.* Abbott, 17 Fed. Rep., 506;
Frelinghuysen *vs.* Baldwin, 12 Fed. Rep., 395;
Armstrong *vs.* Ettlesohn, 36 Fed. Rep., 209;
In re Petition of Chetwood, 165 U. S., 443.

In the case of Commonwealth of Pennsylvania, at the suggestion and to the use of The Commonwealth Title, Insurance and Trust Company, Trustee, &c., *vs.* George H. Earle, Jr., Receiver of the Chestnut Street National Bank (decided by the Supreme Court of Pennsylvania on January 30th, 1899), 189 Pa. St., 606, involving the questions herein and now pending in this court upon writ of error (No. 218, October Term, 1899), the said Supreme Court of Pennsylvania adopted as its own the opinion of the learned president of the lower court, who relied upon the decision in Corn Exchange Bank *vs.* Blye, 101 N. Y., 303, to sustain the view of that court that attachment proceedings such as those in the case at bar are not within the meaning of the prohibition of section 5242 aforesaid. This was error, the action in the New York case was one in *replevin*, and the court held that "re-"*plevin*" was not prohibited, but that "attachment, in-"junction, and execution" in *mesne* process was prohibited.

It has been said by the learned counsel for defendant in error:—

> "The act of attachment is merely to require the "bank, instead of paying to Schall such dividend as

"may be awarded to him upon his deposit, to pay it "to his judgment creditor in satisfaction of his judg- "ment."

(Passing, for the sake of argument, the fact that the bank may not be indebted to Schall)—

We answer, if the power lies in the State court to order —upon a writ of attachment in *mesne* process, garnishing the Receiver of an insolvent National bank—such Receiver to pay a judgment creditor the debt due by it to the judgment debtor, the power is included not only to pay by dividends, but to pay in full, for if the State court has jurisdiction by attachment at all, it has the same power that it would have in a case other than one against an insolvent National bank, and it was this power that Congress has deemed it wise to arbitrarily eliminate from the State courts—illustrating, a National bank contemplates insolvency, liabilities $100,000; assets $50,000, with 100 depositors; it owes 10 depositors $50,000 and the remaining 90 depositors $50,000. The 10 depositors confess judgments aggregating $50,000 to their creditors in a State court, and their then judgment creditors at once seize by notice (garnish) the assets of the bank (Receiver) by issuing and serving writs of attachment *sur* judgment, by this process securing to themselves all the assets, leaving nothing to be administered upon in the hands of the Receiver by the Comptroller of the Currency under section 5234, United States Revised statutes, creating thereby a preference which is forbidden by the statute.

The rights of the creditors of the creditors of an insolvent National Bank are not greater than those of its immediate creditors, and it must be observed that the application to vacate and dismiss the attachment is in this case not made by the bank for the benefit of its stockholders, but by the Receiver of the bank for the benefit of its creditors.

Auburn Savings Bank *vs.* Hayes, 61 Fed. Rep., 911;

The Ocean National Bank *vs.* Carll, 7 Hun., 237;
Wade on Attachments, section 332;
Drake on Attachments (7th ed.), section 452;
Bank of Northern Liberties, Garnishees, *vs.* Jones *et al.*, 42 Pa. St., 536;
White *vs.* Knox, 111 U. S., 784;
National Security Bank *vs.* Butler, 129 U. S., 223.

A Table of the Statutory Laws Cited.

Revised Statutes of the United States, sections 5234, 5236, 5242.

Pepper & Lewis' Digest (Penna. Laws), vol. I., page 1939, section 55 (1836, June 16, Penna. Laws, 755, section 35).

Id., page 1942, section 56 (*Id.*, section 36).

Id., page 1942, section 58 (*Id.*, section 37).

Id., page 1942, section 59 (*Id.*, section 38).

We cite also—

Id., page 1946, section 64 (1872, April 5th, Penna. Laws, 43, section 1).

Id., page 1947, section 65 (1863, April 22d, Penna. Laws, 527, section 1).

Id., page 1946, section 63 (1845, April 15th, Penna. Laws, 459, section 5).

A Table of the Cases and Authorities Cited.

Commonwealth of Pennsylvania, at the suggestion and to the use of the Commonwealth Title Insurance and Trust Company, Trustee, &c., appellee, *vs.* George H. Earle, Jr., Receiver of the Chestnut Street National Bank, appellant, 189 Pa. St., 606.

William Conway *vs.* George H. Earle, Jr., Receiver of the Chestnut Street National Bank, 189 Pa. St., 610.

Pacific National Bank *vs.* Mixter, 124 U. S., 721.

Corn Exchange Bank *vs.* Blye, 101 N. Y., 303.

Farmers and Mechanics' National Bank *vs.* Dearing, 91 U. S., 29.

California Bank *vs.* Kennedy, 167 U. S., 362.

Davis *vs.* Elmira Savings Bank, 161 U. S., 275.

Garner *vs.* Second National Bank, 66 Fed. Rep., 369.

Southwick *vs.* Bank, 7 Hun. (N. Y.), 96.

Rhoner *vs.* Bank (overruling Southwick *vs.* Bank), 14 Hun. (N. Y.), 126.

The Central National Bank *vs.* The Richland National Bank, 52 How. Pr. (N. Y.), 136.

Robinson *vs.* Bank, 81 N. Y., 385.

The National Shoe and Leather Bank *vs.* Bank, 89 N. Y., 440.

Raynor *vs.* Bank, 93 N. Y., 371.

The Chesapeake Bank *vs.* Bank, Garnishee, 40 Maryland, 269.

Bank *vs.* La Due, 39 Minn., 415.

Safford *vs.* Bank and trustee (garnishee), 61 Vt., 373.

The Planter's Loan & Savings Bank *vs.* Berry, 91 Georgia, 264.

Freeman Manufacturing Company *vs.* Bank, 160 Mass., 398.

Gochenaur's Executors *vs.* Hostetter, 18 Pa., St., 414.

Childs *vs.* Digby, 24 Pa. St., 26, 27.

Price *vs.* Abbott, 17 Fed. Rep., 506.

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In Re Chetwood, Petitioner, 165 U. S., 443.

Auburn Savings Bank *vs.* Hayes, 61 Fed. Rep., 911.

The Ocean National Bank *vs.* Carll, 7 Hun. (N. Y.), 237.

Cadle, Receiver of the First National Bank of Selma, *vs.* Tracy, 11 Blatch., 101.

Bank of Northern Liberties, Garnishees, *vs.* Jones, 42 Pa. St., 536.

National Bank *vs.* Colby, 21 Wall., 609, 613.

White *vs.* Knox, 111 U. S., 784.

National Security Bank *vs.* Butler, 129 U. S., 223.

Brewster's Practice (Com. Pleas) (2d ed., 1896), vol. I., sections 108 *et seq.*, 75 *et seq.*, 51 *et seq.*; vol. II., sections 3253 *et seq.*, 3261 *et seq.*

Shinn on Attachment & Garnishment, vol. I., section 191 *et seq.*, chapter XXIII.; vol. II., sections 465 *et seq.*, 467, 469 *et seq.*, and cases cited in note, 485, 500, and note and cases cited, 503.

Freeman on Executions (2d ed.), vol. II., section 416.

Am. & Eng. Enc. of Law, vol. VIII., pages 1100, 1101 *et seq.*

Rood on Garnishment (1896), sections 25, 26, 192.

Id., chapter I.

Wade on Attachments, section 332.

Drake on Attachments (7th ed.), section 452.

Respectfully submitted,

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No. 219.

Office Supreme Court U. S.
FILED
MAR 13 1900
JAMES H. McKENNEY,
Clerk.

No. 219. Of October Term, 1899.

Sup'r. Ct. Pa. of Johnson for D. G.

IN THE

Supreme Court of the United States.

Filed Mar. 13, 1900.

George H. Earle, Jr., Receiver of the Chestnut Street National Bank, Plaintiff in Error,

vs.

William Conway.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

(RECORD No. 17,307.)

JOHN G. JOHNSON,
Of Counsel for Plaintiff in Error.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

[RECORD NO. 17,307.]

George H. Earle, Jr., Receiver of the Chestnut Street National Bank, Plaintiff in Error,	October Term, 1899.
vs.	No. 219.
William Conway.	

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

In addition to the point elaborately argued in the original brief, we beg leave to submit the following supplemental considerations.

The affidavit for a rule to vacate the attachment against the Receiver of the Chestnut Street National Bank showed that said bank had become insolvent on the 23d December, 1897, on which day it suspended payment of its obligations, and that the plaintiff in error had been appointed by the Comptroller of the Currency of the United States, under the laws thereof, Receiver of said bank, on or about the twenty-ninth day of January, 1898. It appears by the docket entries in the Court of Common Pleas, No. 4, of Philadelphia County, (Record, page 9), that on the twenty-fourth day of May, 1898, one Conway, who had obtained a judgment against one Schall, who was a creditor of the bank, caused an attachment execution to issue, which was served upon the said Receiver,

as garnishee, on that day. On the twentieth day of June, 1898, a rule taken by the Receiver, on the eighth day of June, to set aside the service of the writ of attachment and to dismiss and vacate the proceedings therein, was discharged. The result is that a Receiver of an insolvent National bank, duly appointed by the Comptroller of the Currency, is subjected to an attachment proceeding in a State court for the purpose of compelling him to pay, through the sheriff, to Conway, moneys due, or alleged to be due, by the insolvent bank to Schall. Neither the bank nor the Receiver has any interest in those proceedings, which tend to delay the settlement of the affairs of the bank. He is served not in his individual, but in his official, capacity. As a Receiver—an official of the United States—he is summoned to appear in the State court, upon the theory that he has funds of the judgment debtor in his possession. We will show that he has not and cannot have such funds. We will argue that the legal consequence is inevitable that he is exempt from process which can only issue when he has, or can have, such funds.

We submit there is no power whatever to subject the Receiver to such proceedings. He has a right to the protection of this court, because the question he raises is one growing out of the laws of the United States. He claims that under the National Banking Act, he cannot be subjected to an attachment for the purpose of recovering a debt alleged to be due by the bank to a third person, because it is impossible for him to have any funds of the bank subject to attachment.

This court held in Auten *vs.* United States National Bank, 174 U. S., 140, that a Receiver of a National bank, appointed by the Comptroller of the Currency, is an officer of the United States, and that an action against him is one arising under the laws of the United States.

The object of an attachment execution is to seize and appropriate for the benefit of a judgment creditor an indebtedness owing to the judgment debtor by the garnishee attached. If, under the laws of the United States, the garnishee has, and can have, no funds subject to attachment, he is entitled to immunity from such attachment.

The result of sustaining the judgment of the Supreme Court of Pennsylvania will be, to impose upon the Receiver the duty of appearing in court, of employing counsel, of answering interrogatories, of pleading and of submitting to a trial. He will not be compelled to pay the expense to which he will be subjected out of his own funds. These must be paid out of the funds of the insolvent bank. In addition to this, an obligation will be imposed upon him similar to that actually imposed in case No. 218, where the lower court entered a judgment, sustained in the Supreme Court (Record, page 66), which awarded execution in favor of the plaintiff against any dividends upon the debtor's deposit with the bank, and also ordered a sale thereunder of certain stock held by the bank in pledge. If the attachment be allowed to stand, the Receiver will be ordered to pay over any dividends due to Schall, to the sheriff.

By the Act of 30th June, 1876, the jurisdiction of the Comptroller of the Currency to appoint a Receiver is extended to cover cases in which he is satisfied of the insolvency of a National banking association. Whenever a Receiver for a National bank is appointed by the Comptroller of the Currency, it is provided as follows by section 5234:—

> Such Receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such Receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

By section 5236 it is, *inter alia*, provided:—

> From time to time * * * the Comptroller shall make a ratable dividend of the money so paid over to him by such Receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated.

Under the statute, the Receiver can pay no money which comes into his hands, as the result of his administration of the assets of the insolvent bank, to any creditor of the latter. It is his duty to deposit all his receipts of money with the Treasurer of the United States. After such deposit, the same are subject to the order of the Comptroller. It is the duty of the latter, not that of the Receiver, to make dividends thereout in favor of creditors.

The effect of the attachment is to interfere with the Receiver in the discharge of his statutory duty to pay over his receipts to the Treasurer of the United States.

The State court would have no right to make any order upon the Comptroller of the Currency, because he is not within its jurisdiction. Even if moneys in the hands of the Treasurer of the United States could be attached, it is sufficient in the present case to say that no attachment was laid in his hands, though he was in possession of the funds of the bank. The effect of the proceeding, if permitted to stand, would be, to compel the Receiver to deal with an attaching creditor of the bank, in violation of the statute which requires him to deal only with the Treasurer of the United States, under the control of the Comptroller.

Pursuing his duty as prescribed by the statute, the Receiver deposited the moneys of the bank to the order of the Comptroller, with the Treasurer. The State court will hold him under compulsion to pay over to the attaching creditor the dividends which may be awarded to the judgment debtor. How can he do this, without withholding money, with which the statute compels him to deal differently?

We concede that we are not considering the case of an attachment against a Receiver appointed by a judicial authority. This court has held that such is not the *status* of a Receiver of a National bank.

In re Chetwood, 165 U. S., 458, it was said by Mr. Chief Justice Fuller :—

> The Receiver was not the officer of any court, but the agent and officer of the United States. * * * The Receiver acts under the control of the Comptroller of the Currency, and the moneys collected by him are

paid over to the Comptroller, who disburses them to the creditors of the insolvent bank. Under section 5234 of the Revised Statutes, when the Receiver deems it desirable to sell or compound bad or doubtful debts, or to sell the real and personal property of the bank, it devolves upon him to procure " the order of a court of record of competent juris- "diction," but the funds arising therefrom are disbursed by the Comptroller.

We are dealing, however, with an officer of the United States, compelled by its laws to perform his official duty in a certain way. The moment, therefore, we find that an attachment issued out of the State court will prevent such performance, we demonstrate our proposition, that such attachment, because of such consequence, is illegal.

In Bank of Bethel *vs.* Pahquioque Bank, 14 Wallace, 401, this court determined that the claims of creditors might be established, either by proof before the Comptroller, or by suit against the association in any court of competent jurisdiction; but it implied that they could only be paid through the Comptroller. If the proceedings appealed from in the State court be sustained, the claims of creditors of the bank must be paid, in case of an attachment by a State court, by the Receiver.

In Hitz *vs.* Jenks, 123 U. S., 298, it was held that a Receiver of a National bank, appointed by the Comptroller of the Currency, is not accountable in equity to the owner of real estate for rents thereof received by him as such Receiver and paid by him into the Treasury of the United States, subject to the disposition of the Comptroller of the Currency under section 5234 of the Revised Statutes.

We submit that this decision establishes the principle for which we contend, viz., the immunity of the Receiver against any proceedings having for their purpose the taking out of his hands any moneys or property received by him in his official capacity.

This principle was acted upon by the Circuit Court of Appeals of the Fifth Circuit in the case of Merrill *vs.* First National Bank of Jacksonville, 75 Fed. Rep., 148, where it was held that in a suit against a Receiver of an insolvent National bank to establish the claim of a creditor and his

right to a dividend, the decree should not direct the payment of the dividend by the Receiver, since the assets of such bank are, under the statutes, entirely within the control and disposition of the Comptroller of the Currency, but that said decree should direct that the claim of the creditor, as established, should be certified to the Comptroller, to be paid in due course of administration.

In the present case there could not even be a direction of a certification to the Comptroller, because the only basis of the attaching creditor's right, is a service of his attachment upon a person possessed of funds belonging to the judgment debtor.

In the case of Wolf *vs.* McNulta, decided by the Supreme Court of Illinois in 1899, 52 N. E. Reporter, 896, that court recognized its inability to make any order upon a Receiver to pay over the funds of a National bank, and contented itself with the entry of an order requiring him to certify a claim against the bank to the Comptroller of the Currency. In that case the claim was directly against the bank and was established by the judgment. In our case, and the attaching creditor had no claim against the bank; but, by virtue of his levy upon funds supposed to be in the hands of the Receiver, belonging to the bank, the latter was brought into the State court. Inasmuch as he had no such funds, the State court acquired no jurisdiction.

We do not regard as being subject to doubt, the point we make, viz., that the Receiver, who has no funds with which he can pay the judgment debtor, can be made to pay anything to an attaching creditor of such debtor.

Can it be said, however, that in such event the attachment works no harm, and that it is not necessary to order its vacation?

We have shown that it does work harm. It entails upon the Receiver trouble and expense, in appearing in the State court and there protecting himself by counsel.

The attaching creditor was bound to know that the Receiver could not have funds which he could pay to his debtor; and that it was the duty of the Receiver to pay over

all that came into his hands into the Treasury of the United States. There could be no other result of his action than to subject the Receiver to useless trouble and expense. It is the duty of the courts of the United States to protect its officers against such action, and to protect those interested in the enforcement of its laws against useless expense.

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